



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 183 OF 2016

LUCY WACUKA MWANGI.....1ST PLAINTIFF

ESTHER WAITHERA CHEGE.....2ND PLAINTIFF

DAVID NDUNG’U CHEGE.....3RD PLAINTIFF

PETER KAHIGA.....4TH PLAINTIFF

VERSUS

DANIEL MASIKA SADAKA.....DEFENDANT

RULING

1. The background to the instant application is that on **4/2/2021** and that is the day on which the main suit was coming up for hearing, Mr. Kaosa and Mr. Teti, Counsel for the defendant and Mr. Ambutsi Counsel for the plaintiffs appeared before me when Mr. Teti informed the court that he had been unable to file the amended defence within the time ordered by the court as he had not been served with the ruling of the court granting leave to amend the defence. However by the morning of **4/2/2021** an amended defence was in the court record. Mr. Teti prayed that the amended defence and the documents attached to it be deemed as properly filed and served. Mr. Teti is on record as stating that the defendant had been sick for quite some time. However Mr. Ambutsi was insistent that the court registry had sent by electronic mail the ruling allowing the amendment to both Mr. Kaosa and Mr. Teti and that Mr. Kaosa had been served. He maintained that the hearing should therefore proceed without the defendant’s documents. However this court allowed the application for adjournment in a reasoned ruling that was read to the parties on **4/2/2021**. It also granted Mr. Teti’s request that the defendant’s amended statement of defence and the attached documents be deemed as properly filed. Mr. Ambutsi and the plaintiffs took a brief retreat, ruminated over the events of **4/2/2021** and apparently found the orders extremely indigestible and therefore lodged the instant application dated **24/2/2021**.

2. The application dated **24/2/2021** and filed by the plaintiffs on the same date has been bought under **Sections 1A, 3 & 3A, 63(e)** of the **Civil Procedure Act, Order 10 Rule 11** of the **Civil Procedure Rules**. In it, the plaintiffs seek the following orders:-

1. That this honourable court be pleased to review its orders of 4/2/2021, reverse the said orders and hold that the defendants were properly served with the ruling dated 30/7/2020.

2. That the amended defence and counterclaim be expunged from record.

3. That the costs of this application be in the course.

3. The application is supported by the affidavit of the defendant’s counsel sworn on **22/2/2021**. The grounds upon which the application is made are that there are two defence counsel on record; that the defendant was to file and serve an amended defence by **8/8/2020** in accordance with the court’s directions issued on **30/7/2021** but failed to do so; that the suit came up again on **20/12/2020** and it was fixed for hearing on **4/2/2021** in the absence of the defendants’ counsel; that the ruling dated **30/7/2020** had been served by way of electronic mail upon Mr. Kaosa, the lead counsel for the defendant and a printout of the addresses to which the electronic mail attaching *inter alia* the subject ruling had been sent to was exhibited in the supporting affidavit. The application states that on **4/2/2021** the plaintiffs were ambushed by claims of non-service by Mr. Teti and could not effectively address them; now that the evidence points to the fact that the lead counsel for the defence had been served, state the plaintiffs in their application, such service is sufficient and the orders that the amended defence and other documents be deemed to be properly filed was obtained on the basis of misrepresentation by the defence counsel. It was the plaintiffs’ apparent argument that the ruling needed not be served on both counsel for the defence.

4. The defendant filed a replying affidavit on **13/4/2021** sworn by Mr. Teti the assisting counsel. In it he deponed that the application is *res*

judicata and in any event that it does not raise any new issues not within the applicant's knowledge as at 4/2/2021; that the application is fatally defective and an abuse of the court process; that the counsel for the plaintiffs never protested the court's decision on 4/2/2021 or filed an appeal therefrom; that the plaintiffs have also failed to file any response to the amended defence; that the plaintiffs would not be prejudiced as they would have an opportunity to file amendments to their plaint; that the application for amendment of defence was made by Mr. Teti's firm and the printout exhibited by the plaintiffs application does not show that that firm of advocates was served yet they were the ones to be affected by the ruling and that for the foregoing reasons the application has not met the threshold for review.

SUMMISSIONS

5. The defendant's submissions dated 8/4/2021 were filed on 13/4/2021. I will in my discretion give a ruling on this matter even though the applicants have failed to file their submissions because this is a matter that arises from events that transpired in court and in respect of which an earlier ruling has been made, but this action should not be in any way be deemed as condonation of the plaintiff's omission to file submissions which would otherwise have been possibly penalized by dismissal.

6. From the outset I must state that the duty of the court is to hear matters on merit and avoid overreliance on procedural technicalities. **Article 159 (2) (d)** emphasizes that justice shall be served without any undue regard to technicalities

7. **Article 159 (2) (d)** provides that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

a....

b....

c....

d justice shall be administered without undue regard to procedural technicalities.”

8. In the case of **Republic vs. District Land Registrar, Uasin-Gishu & Anor (2014) eKLR** it was held as follows:

“.. to my mind, Justice is not dependent on rules of technical procedures. Justice is about doing the right thing.”

9. In construing the just course to take concerning the instant application this court recalls that the main application for amendment was canvassed and granted and the only bottleneck that arose in the prosecution of the main suit was the delay by the defendant to file his amended defence as ordered. The decision to grant leave to amend the defence was not appealed or sought to be reviewed. It is the apparent sloth on the part of the defendant and alleged misrepresentation on the part of the defence counsel that has provoked the instant application.

10. Regarding the sloth it is the opinion of this court that it dealt with the issue in its ruling made on 4/2/2021 while determining whether to deem the defendant's documents properly filed and served, and allowed the defence counsel's oral application. The grant of leave implies that the court was satisfied with the explanations given by the defence counsel during the sitting held on 4/2/2021. This court can not therefore revisit the decision of 4/2/2021 on that ground.

11. Regarding the misrepresentation I have noted that Mr. Kaosa was according to the exhibited printout annexed to the instant application, served by way of electronic mail with the ruling of this court that was delivered on 30/7/2020. Mr. Kaosa and Mr. Teti are acting in concert and I do not see any justifiable ground upon which service upon one of two counsel handling a litigation should not be deemed as service upon both as that would defeat the defendant's very purpose of having two counsel. It would also in my view imply that the defendant is getting services from counsel who are not capable of any co-ordination in a matter entrusted to them. Besides, public policy impact on the administration of justice of such an apparently innocuous holding may be colossal in that parties may be able engage in sessions of hide and seek within litigation which is otherwise a solemn affair.

12. That said, I find that there was misrepresentation on the part of counsel by stating that there was no service of the ruling upon them while the contrary was the case. However, whatever other ground that the defendant's counsel relied on in this application pales in significance when the ruling delivered on 4/2/2021 is perused. One will find the following statements in that ruling:

(3) Further, I have no evidence that Mr. Teti and Mr. Kaosa were served with the ruling. There being no such evidence the court can not verify that they were served. However it is for every diligent litigant or his counsel to follow up, assiduously the ruling once the ruling date is past, and Mr. Teti states that he followed up but the file was missing, but he has no evidence to prove that he followed up. I will allow him a margin for now and assume he only made oral enquiries. Be that as it may this court must adjourn the matter for sickness on the part of the defendant.

13. It is quite evident that the main consideration of the court in granting the application was *force majeure*- the sickness of the defendant- which had been reported to court by his counsel. Sickness may disrupt humanity's best laid plans. I have not heard counsel for the applicant for once insinuate that the defendant was hale. However, the fact remains that there was an element of misrepresentation of facts in this case.

14. Should this court then intervene and set aside the orders of 4/4/2021 and expunge the defendant's amended defence and other documents?

15. In this court's view the application for orders of expunging the defendant's documents may do more harm than good in this litigation for

obvious reasons. The desire and the overriding objective of every court is to come to judgment on the merits of any litigation before it within the shortest time and while occasioning the least expense to the parties.

16. This court must consider the “**overriding objective**” under **Sections 1A &1B** of the **Civil Procedure Act** in order to reach a fair decision on the instant application.

17. In the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** the High Court observed as follows:

“Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties. It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.

The overriding concept however came to cure this. Michael Howard [Civil Litigation and Dispute resolution: Vocabulary Series, Legal English Books Publishers, 2013] defines the Overriding Objective “as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”

The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle.”

18. I am in total agreement with the above holding. Indeed, in total observance of that principle, the ruling of this court issued on **4/2/2021** stated as follows in part:

(4) In view of Mr. Ambutsi’s sentiments that a written application is required to seek leave to file the amended defence and counterclaim, this court’s first duty is to ensure expeditious disposal of litigation and nothing but the reasons advanced by Mr. Teti will be advanced in such an application yet it may consume a long time before disposal owing to the procedures involved.

19. In this suit it is true that the defendant delayed the hearing of the suit considerably, though this was substantially extenuated by claims of illness on his part. However when his counsel attended court they did not attend empty handed but with filed documents for which they sought leave to be deemed as properly filed. I consider this as a case different from that of a person who would perilously exposing his client’s case, appear before me and, wringing his bare hands, plead for a shred of indulgence as some counsel have of late been deprecably wont to do, on the undertaking that they will file the ordered documents “*by tomorrow.*”

20. Though a litigant is in principle bound by the acts and omissions of his counsel, on numerous occasions the court has been compelled by the call of justice not to submit a litigant’s quest to meekly die on the altar of those acts and omissions, but to overlook them in favour of doing substantive justice to all the parties. See the cases of **Sheikh T/A Hasa Hauliers v Highway Carriers Ltd [1988] eKLR** and **Joseph Mweteri Igweta -vs- Mukira M’Ethare & Attorney General 2002 [eKLR]** and **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR**. An example of cases gone horribly wrong is the sorry plight of some litigants has been witnessed where their counsel entered into consents which the litigants never gave authority for and with whose usually unsavoury consequences they have had to live with. Fortunately this is an application that relates to a less extreme event, and it must be accorded proportionate treatment for that reason.

21. Barring any other future application based on misrepresentation regarding the defendant’s health which would be a serious matter, I would think that it is time the parties and the court viewed the current litigation through the prism of **Article 159(2) (d)** and acted to expedite it instead of tarrying on the path to judgment. Absent delay arising from any more interlocutory applications in this matter the hearing of the defendant’s evidence should begin at the earliest so that we write *finis* to this litigation.

22. The upshot of the foregoing is that the application dated **24/2/2021** is hereby dismissed, but owing to the fact that some elements of the applicants’ claims bore veracity, its costs shall be borne by the defendant.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21ST DAY OF APRIL, 2021

MWANGI NJOROGI

JUDGE, ELC, KITALE.